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No. 99-_____

In the Supreme Court of the United States

TEXAS TECH UNIVERSITY AND TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER,
Cross-Petitioners,
v.

UNITED STATES OF AMERICA EX REL.
CAROL REA COOPER FOULDS,
Cross-Respondent,
v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did Congress intend to include the States within its definition of the word "persons" in the False Claims Act, 31 U.S.C. § 3729 et seq. (West Supp. 1998) and, thereby, subject the States to liability for treble damages and civil penalties under the Act?[1]

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[1] This question is presented in *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *pet. for cert. granted*, No. 98-1828 (June 24, 1999).

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CITATION TO CASE AS REPORTED BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 171 F.3d 279 (5th Cir. 1999). Appendix of Petitioner Foulds in No. 99-321 at 1 to 51. The district court's order denying Texas' Motion to Dismiss is reported at 980 F. Supp. 864 (N.D. Tex. 1997). Appendix of Petitioner Foulds at 52 to 76.

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on March 29, 1999. Fould's Petition for Rehearing was denied on June 1, 1999. Foulds filed her Petition for Writ of Certiorari on August 23 1999. The United States filed its Petition for Writ of Certiorari on August 27, 1999. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

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STATUTORY PROVISION INVOLVED

31 U.S.C. § 3729

False claims

(a) Liability for certain acts
Any person who–
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to

> get a false or fraudulent claim paid or approved by the Government;
>
> . . . .
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . . A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

STATEMENT OF THE CASE

Carol Rae Cooper Foulds sued Texas Tech University and Texas Tech University Health Sciences Center, as well as other non-state entities, Lubbock County, Lubbock County Hospital District and the University Medical Center, asserting claims under the False Claims Act, 31 U.S.C. § 3729-3733 (West Supp. 1997) for alleged Medicare and Medicaid fraud. The United States declined to participate in the suit.

The False Claims Act creates a scheme in which a plaintiff who alleges independent knowledge of fraud against the federal government may initiate and prosecute a lawsuit using the name of the United States. 31 U.S.C. § 3729-3733 (West Supp. 1997). The suit is originally filed under seal and the federal government,

acting through the United States Attorney General, has the opportunity to investigate the allegations and to decide whether or not to intervene. 31 U.S.C. § 3730 (West Supp. 1997). If the federal government elects not to proceed with the action, the *qui tam* plaintiff has the right to conduct the action on her own behalf and on behalf of the government. 31 U.S.C. § 3730(c)(3) (West Supp. 1997). The original complaint may then be unsealed and the trial court may order that it be served on the named defendant(s). *Id.* § 3730(b)(3). A defendant may be liable for a civil penalty of not less than $5,000 and not more than $10,000 for each false claim, plus three times the amount of damages which the federal government sustains because of the act of that person (or two times the amount of damages in certain instances). *Id.* § 3729(a). The *qui tam* plaintiff is entitled to a share of the proceeds from the action or settlement, which varies from 15 to 30%, and is entitled to reasonable expenses, attorneys fees and costs. *Id.* § 3730(d)(1) and (2). All such expenses, fees and costs are awarded against the defendant. *Id.*

REASONS FOR GRANTING THE CROSS-PETITION

If this Court accepts the Petitions for Certiorari in this case, it is important that it consider the alternative question presented below by state defendants: whether Congress intended in the False Claims Act to extend liability to the states by including them in the term "person" in § 3729(a)(1). The Fifth Circuit decided that the Eleventh Amendment barred a *qui tam* relator's suit against a state when the United States did not intervene and determined, therefore, that it lacked the subject matter jurisdiction to proceed to decide the statutory question.

Feeling bound by its decision in *Ruhrgas*, the Fifth Circuit approached the problem presented by the False Claims Act

precisely but narrowly. *Marathon Oil Co. v. A.G. Ruhrgas,* 145 F.3d 211, 222-23 (5th Cir. 1998) (en banc), *rev'd* 119 S. Ct. 1563 (1999). Since Congress can subject a state to suit in the exercise of its Constitutional authority despite the state's sovereignty, whether Congress intended to create a cause of action against a state by a private party or by the federal government is "a . . . logical prerequisite to the jurisdictional inquiry." *United States ex rel. Long v. SCS Business & Technical Institute Inc.,* 173 F.3d 890, 894 (D.C. Cir., 1999) (*Long II*). *See Alden v. Maine,* 119 S. Ct. 2240, 2246-2248 (1999)

The Fifth Circuit's decision leaves open two questions which, while "live," implicate important federalism concerns and create uncertainty between the states and the federal government as they share responsibility for the administration of taxpayer programs: first, whether a *qui tam* suit under the FCA is allowed against a state if the United States intervenes at some point in the litigation; second, whether a suit under the FCA for treble damages and civil penalties is allowed against a state if commenced by the United States. The uniqueness of states in relation to other potential defendants who could be sued by the federal government under the FCA makes determining if Congress even intended to create a cause of action against states an inquiry into whether Congress saw the False Claims Act as an appropriate assertion of federal supremacy. If this Court determines that a state is not a "person" for the purpose of liability under the Act, these questions disappear and the Act becomes a pragmatic and logical exercise of Congressional power to punish private persons who defraud the government.[2]

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[2] Recent opinions have suggested other constitutional problems with the FCA. "[I]t should be noted that FCA qui tam suits stand on shaky constitutional ground with respect to the principle of separation of powers as embodied in Article II's Appointments and Take Care Clauses and Article III." *United*

1. The Court Should Resolve The Circuit Conflict Over Whether Congress Intended To Include The States Within Its Definition of "Persons" In The False Claims Act.

Resolution of the "persons" question is necessary because of a conflict in the circuits. The Eighth Circuit and the Second Circuit have found congressional intent to include the states in the definition of "person," and the District of Columbia Circuit has found no support for the inclusion.

The Eighth Circuit declined in *United States ex rel. Zissler v. Regents of The University of Minnesota*, 154 F.3d 865 (8th Cir. 1998) to apply the statutory presumption against including sovereigns in the term "person" stating that it applied only to the enacting sovereign and only when the purpose of the statute was in doubt. *Id.* at 874. The *Zissler* court perceived the FCA as having a broad remedial purpose which justified placing the burden on the state to show a specific exemption from the reach of the Act. In similar fashion, the Second Circuit found that the FCA did not alter the constitutional balance of federal and state power and refused to apply the "plain statement" rule explained in *United States v. Bass*, 404 U.S. 336, 349 (1971). *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *pet. for cert. granted*, No. 98-1828 (June 24, 1999). *Stevens* reasoned that the goal of the FCA was to deter

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States ex rel. Stevens v. State of Vermont Agency of Natural Resources, 162 F.3d 195, 219 (2nd Cir. 1998)(Weinstein, J., dissenting). The Fifth Circuit acknowledged these concerns. *Foulds*, 171 F.3d at 292 n. 21.

One district court has determined that a *qui tam* plaintiff lacks standing. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tex. 1997)(No. 97-20948) (5th Cir. argued May 5, 1999). *See also Stevens*, 162 F.3d at 229 (Weinstein, J. dissenting).

and remedy fraud and because "the states have no right or authority, traditional or otherwise, to engage in such conduct," no federalism concerns were implicated. *Id.* at 203. However, the D.C. Circuit accepted that "states are excluded from the term person absent an affirmative contrary showing" and found no textual support or support in the legislative environment or in the legislative history for including states in the term "person" in the FCA. *United States ex rel. Long v. SCS Business and Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999)(*Long I*).

False Claims Act litigation is expensive for states and exposes the state fisc to significant liability. As the *Foulds* court noted, Foulds alleged over 400,000 false claims based on incorrect Medicare and Medicaid billings, each of which could bring fines between $5,000 and $10,000, and the trebling of $20 million in overpayments. 171 F.3d at 282 n.1. If the state is subject to the FCA, it could face between $2 billion and $4 billion in fines and $60 million in damages. It is bad public policy to burden blameless taxpayers with huge damage awards for the supposed benefit of the federal government. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263, 266-67 (1981) (recognizing that "[n]either reason nor justice" suggests that retribution in the form of punitive damages should be visited upon blameless and unknowing taxpayers). Application of the Act in the *Foulds* situation is not even justified by reasoning that one state should not be allowed to siphon off funds fraudulently that could otherwise be distributed to the remaining states. The confusion surrounding the federal regulations which is the basis for Foulds' allegations of fraud have been the subject of a nationwide initiative by the OIG known as Physicians at Teaching Hospitals (PATH) audits which have left few states untouched by potential FCA liability at their state-run teaching hospitals. *See* Steven J. Chananie, *AAMC, Other Professional Organizations File Suit to End PATH Audits,* 10 N.Y. HEALTH L. UPDATE 4 (1997).

Inevitably, the federal government's continued delegation of responsibility to states to administer federal programs, under the policy of "New Federalism," exposes states to a broad range of potential liability.[3] If the FCA can be applied to the states, the federal fisc is positioned not only to recoup dollars that were inappropriately paid out, but to collect a windfall from state taxpayers hundreds of times greater than the overpayment.[4] "It is reasonable to apply more stringent requirements to debts owed by private persons and to keep the more flexible common law in place for debts owed by state and local governments." *United States v. Texas,* 507 U.S. 529, 536 (1993).

Under basic rules of statutory construction, states should not be considered "persons" when that term is used in 31 U.S.C. §

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[3] *See* Thomas S. Ulen, *Economic & Public Choice Forces in Federalism,* 6 GEO. MASON L. REV. 921 (1998) (discussing the shift of responsibility for administering federal programs to states); *United States ex rel. Churchill v. NHIC,* No. 98-50605 (5th Cir. mandate stayed Aug. 31, 1999) (involving three state agencies, the Tex. Dep't of Health, the Tex. Dep't of Human Services and the Tex. Comm'n on Health and Human Services and litigating whether it was fraud in the administration of Medicaid and Medicare dollars for the state not to require greater recovery in subrogation by the fiscal intermediatry, NHIC).

See Stevens (Weinstein dissenting) 162 F.3d at 225-228 (discussing the damage done by a coercive weapon like the FCA to the cooperative relationship that is necessary for administration by the states of federal programs).

[4] All federal programs which send money to the states have ample safeguards to require refund of monies if they have been incorrectly applied. *See* 42 U.S.C. § 1395(u) and (hh); *United States v. Texas,* 507 U.S. 529 (1993); *Bennett v. Kentucky Dept. of Ed.,* 470 U.S. 656, 662 (1985); *Bell v. New Jersey,* 461 U.S. 773, 790 (1983); *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger,* 517 F.2d 329 (5th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976).

3729(a)(1), the liability-creating section of the FCA. The word "person" is not defined generally in the Act or for purposes of this section and there is no reference to "states" in this section. Section 1 of Title 1 of the United State Code–Rules of Construction dictates that "[when] determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Missing from this broad application of the word "person" are states, state entities or other governmental entities.

The statutory language of the False Claims Act only includes the states in its definition of a "person" as it pertains to civil investigative demands under 31 U.S.C. § 3733.[5] Section 3733, added in 1986, plainly states that the definitions contained there apply "[f]or purposes of this section." *See* § 3733(1).[6] The fact that "person" is defined as including a state entity for "purposes of this section [§ 3733]" argues against congressional intent to include the states within the scope of "person" in the liability-creating sections of the Act. 31 U.S.C. § 3733(l)(4). "[W]here

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[5]Because states are frequently partners in the disbursement of federal funds under New Federalism, it is not surprising that Congress saw fit to provide that the Department of Justice could confidentially get information from them without court involvement or complaints about the cost during the process of deciding whether grounds exist for initiating false claim actions against private contractors.

[6] When Congress added § 3733 to the FCA it borrowed the provision from the Hart-Scott-Rodino Antitrust Improvement Act of 1976. The legislative history for the Hart-Scott-Rodino Act explains that the civil investigative demand provisions of that Act are intended to reach "'target and non-target' third parties with relevant information." H. R. REP. No. 94-1343 (1976).

Congress include[s] particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)(citations omitted).

The Court in 1979 noted that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." It observed that this was "[p]articularly... true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage."[7] *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979) (internal quotes and citations omitted) (construing a statute which prevented and provided remedies against non-Indian squatters on Indian lands). The Court repeated the rule that in ordinary usage the term "person" does not include states in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). *Will* also noted that the Congress of 1863, when the False Claims Act was originally enacted, would not have assumed that "person" included states. *Will*, 491 U.S. at 68 nn. 8 & 9.

The False Claims Act was intended "to stop the massive frauds by large contractors, during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). As originally enacted, it mandated imprisonment, a remedy which could not apply to a

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[7] Relying on *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941), *Wilson* went on to note that there was "no hard and fast rule of exclusion, and much depends on the context, the subject matter, legislative history, and executive interpretation." *Wilson*, 442 U.S. at 667. However, in *International Primate Protection League v. Admin. of Tulane Educational Fund*, 500 U. S. 72, 83 (1991), the Court put *Cooper* in context by characterizing the rule that the word "person" does not include the sovereign as a presumption that must be overcome.

state. Act of March 2, 1863, ch. 67 § 3, 12 Stat. 698. The word "person" in the section creating civil liability in the Act has not been amended since it was originally enacted in 1863.

Nor does the legislative history of the Act suggest congressional intent to subject states to suit. This is highlighted by the sponsor of the Act, Senator Howard, who said the purpose of the Act was to

> hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. . . . I have based the [provisions] upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue" which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (cited in *Foulds*, 171 F.3d at 293). The House Select Committee, which investigated Civil War fraud prior to the passage of the FCA, issued a report in December of 1861 that discussed allegations of "personal aggrandizement" on the part of state officials in Indiana, Ohio, New York and Illinois. The discussion of the problem does not reveal any intent to subject the states to liability for fraud but, instead, shows that states were thought of as partners in "demand[ing] the highest integrity of those invested with public trusts, and each [the states and the federal government] should hold their agents, by rigid scrutiny, to severe accountability." H.R. REP. No. 2, part 2 (1862).

The False Claims Act was amended in 1986 and the definition of "person" was not changed to include states. Pub. L. 99-562 § 3, Oct. 27, 1986, 100 Stat. 3153. The amendments to the FCA

were passed by the same Congress that passed the Program Fraud Civil Penalties Act (PFCPA), 31 U.S.C. § 380, *et seq.* and the Anti-Kickback Act of 1986, 42 U.S.C. § 52(3). These Acts create liability for similar conduct. The PFCPA and the Anti-Kickback Act define "person" and their definitions also do not include states. In fact, in each of these Acts, the word "organization" is clarified by the word "private." The traditional statutory construction principle of *in pari materia* establishes that the use of a word in one statute which is *in pari materia* with another statute is persuasive of its meaning in the other. *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995), *cert. denied*, 516 U.S. 1000 (1995). When Congress uses the same forms of statutory language in different statutes having the same general purpose, courts presume that Congress intended the same interpretation to apply in each instance. *Northcross v. Bd. of Ed.*, 412 U.S. 427, 428 (1973).

The only legislative history supporting the inclusion of states as defendants in the FCA is not deserving of any weight. *Long I*, 173 F.3d at 878. The Senate Report that accompanied the 1986 amendments noted that the False Claims Act "reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . .as well as states and political subdivisions." S. REP. No. 99-345, at 8 (internal citations omitted). This statement is not entitled to any weight because it does not describe the 1986 amendments but is part of the "history of the False Claims Act and Court Interpretation" section which was a repeat of a background discussion contained in an earlier Senate Report which had accompanied a failed effort to amend the False Claims Act in 1979-80. Compare S. REP. No. 99-345 at 8-10 with S. REP. No. 96-657 at 2-4. At the time the statement was written, it was incorrect because there was no legislative evidence or case on point indicating that "person" in the False Claims Act included the

states. The one court that had addressed the issue in a case, which admittedly has no precedential value, held that states were not "persons" under the Act. *United States ex rel. Weinberger v. Florida*, No. TCA 77-0873 (N.D. Fla. Apr. 21, 1978), *vacated for lack of jurisdiction*, 615 F. 2d 1370 (5th Cir. 1980); *see Long I*, 173 F.3d at 879. The language from S. REP. No. 99-345 was irrelevant to the proposed amendments, and the report's "section-by-section" analysis did not describe the liability provision of the Act, 31 U.S.C. § 3729, as subjecting the states to any liability, even though that section was amended to increase the double damage provision to a treble damage provision and to enhance the civil penalties.

If there is no ambiguity when a statute is read in its natural way, the inquiry should end. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also Mississippi Poultry Ass'n., Inc. v. Madigan*, 31F.3d 293, 299 (5th Cir. 1994). A plain reading of 31 U.S.C. § 3729(a)(1), the liability creating section of the FCA, does not indicate that states are subject to liability. Even if the Court considers the *Cooper* factors (purpose of the statute, subject matter, context, legislative history and executive interpretation), it should conclude that states were not intended as defendants in the FCA. *See United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

However, if the Court determines that the statute is ambiguous, the rule of *Hilton v. South Carolina Public Railways Comm'n.*, 502 U.S. 197, 206 (1991), instructs that "a plain statement" rule should be used to interpret federal statutes which, if applied to states, could subject them to monetary liability.[8] Thus, absent a

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[8] *Hilton* did not apply the "plain statement" rule because of *stare decisis* and the reliance that had been placed on a previous construction of the Federal Employers' Liability Act (FELA). However, in resting on stare decisis, *Hilton*

clear statement that a statute applies to the states, a court should find that the statute does not apply. As observed in *Will*, when Congress "intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65. *Will* explicitly notes that this rule cannot be limited to Eleventh Amendment cases. *Id.* *Gregory v. Ashcroft*, which is not an Eleventh Amendment case, relies on the same line of cases relied on by *Will* for the proposition that the "plain statement rule is nothing more than an acknowledgment that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461. The requirement of a clear statement exists even when the suit is brought by the federal government.[9] Citing *Pennhurst*,[10] *Will* noted that Congress should make its intention clear if it intends to impose a condition on the grant of federal moneys. *Will*, 491 U.S.

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acknowledged that in most cases *Will* and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), should be followed. *Hilton*, 502 U.S. at 566. Additionally, *Hilton* relied on *Parden v. Terminal Rwy.*, 377 U.S. 184 (1964), which has been overruled. *See College Savings Bank v. Florida Prepaid Post Secondary Education*, 119 S. Ct. 2219 (1999).

[9] The "real party in interest" analysis applied by the Eighth Circuit is irrelevant to determining Congressional intent to include states as parties subject to liability in drafting the False Claims Act. *Zissler*, 154 F. 3d at 872. For purposes of determining whether applying the FCA to the states affects the federal-state balance, Texas maintains that the treble damages and civil penalties are enough of an intrusion on federal-state relations to require applicability of the "clear statement" rule.

[10] *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

at 65. The general rule is stated in *United States v. Bass*, 404 U.S. 336, 349 (1971), also cited in *Will*,

> [in] traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. Far from a "clear statement, as the Fifth Circuit observed, "no relevant provision of the Act explicitly mentions states as defendants." *Foulds*, 171 F.3d at 294.

If Congress intends to treat states as if they could be guilty of fraud against the federal government, and if it intends to subject the states' treasuries to the treble damages and civil penalties of a statute like the FCA, it should be obligated by federalism concerns to state its intention clearly. If the rule established by *Wilson* and *Will* has any meaning at all, it must create at minimum a default rule; states are excluded from the term "person" absent an affirmative contrary showing. *Long I*, 173 F.3d at 874.

CONCLUSION

Cross-Petitioners respectfully request, if the Court grants Foulds' petition in No. 99-321 or the United States' petition in 99-365, that it also grant this cross-petition and affirm the judgment of the Fifth Circuit.

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Supreme Court, U.S.
FILED
DEC 8 1999

(2)

No. 99-513

In the Supreme Court of the United States

TEXAS TECH UNIVERSITY, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA,
EX REL. CAROL RAE COOPER FOULDS, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a State or state agency is a "person" subject to potential liability under the False Claims Act, 31 U.S.C. 3729.

In the Supreme Court of the United States

No. 99-513

TEXAS TECH UNIVERSITY, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA,
EX REL. CAROL RAE COOPER FOULDS, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (99-365 Pet. App. 1a-34a)* is reported at 171 F.3d 279. The opinion of the district court (99-365 Pet. App. 35a-50a) is reported at 980 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. A petition for rehearing was denied on June 1, 1999 (99-365 Pet. App. 51a-52a). Petitions for a writ of certiorari were filed on August 23, 1999 (No. 99-321) and August 27, 1999 (No. 99-365). The conditional

* References to "99-365 Pet. App." are to the appendix to the petition for a writ of certiorari in *United States* v. *Texas Tech Univ.*, No. 99-365.

cross-petition for a writ of certiorari was filed on September 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits a variety of deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(1)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a). Suits to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1); 99-365 Pet. 3.

2. The instant case involves a *qui tam* action filed by Carol Rae Cooper Foulds. The defendants included Texas Tech University and Texas Tech University Health Sciences Center. Those state entities are the cross-petitioners in this Court. The district court denied the state defendants' motion to dismiss the *qui tam* claims against them. 99-365 Pet. App. 35a-50a. The court of appeals reversed, holding that the suit was barred by the Eleventh Amendment. *Id.* at 1a-34a; see 99-365 Pet. 4-5.

3. The relator and the United States filed petitions for a writ of certiorari. See *United States ex rel. Foulds* v. *Texas Tech Univ.*, No. 99-321; *United States* v. *Texas Tech Univ.*, No. 99-365. Those petitions present the question whether the Eleventh Amendment bars a *qui tam* suit against a State or state agency.

Those petitions are currently pending before this Court.

DISCUSSION

The conditional cross-petition for a writ of certiorari argues (at 14) that, if this Court grants certiorari in No. 99-321 or No. 99-365, it should also consider the question whether a State or a state agency is a "person" subject to potential liability under 31 U.S.C. 3729(a). On November 29, 1999, this Court heard oral argument in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828. That case presents the same question of statutory interpretation that is presented in the conditional cross-petition here, as well as the same Eleventh Amendment question that is presented in Nos. 99-321 and 99-365. See 98-1828 Pet. at i. The conditional cross-petition for a writ of certiorari should therefore be held pending this Court's decision in *Vermont Agency of Natural Resources* and then disposed of as appropriate.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be held pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828 (argued Nov. 29, 1999), and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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Solicitor General

DECEMBER 1999

(3) (3)

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Nos. 99-513 & 99-365

In the Supreme Court of the United States

TEXAS TECH UNIVERSITY AND
TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.*
CAROL RAE COOPER FOULDS,
Cross-Respondent,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

FOULDS'S BRIEF IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION

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Cross-Respondent Foulds submits this Response to Texas Tech University and Texas Tech University Health Sciences Center (hereafter "Texas Tech") Cross-Petition For a Writ of Certiorari (S.Ct. No. 99-513), as well as to the United States's Petition for a Writ of Certiorari (S.Ct. No. 99-365).[1] The issue in the cross-petition is whether State-funded institutions that engage in precisely the same kinds of fraudulent conduct affecting the federal treasury as do privately owned entities should be deemed exempt from the definition of "persons" that can be held liable under the 1986 amendments to the Federal False Claims Act. Cross-petitioners ask this Court to grant them such an exemption. They do so notwithstanding Congress's understanding at the time the 1986 amendments were introduced that States already could be held liable under the previous terms of the False Claims Act. And they do so despite Congress's clear intent to continue to hold States liable for fraudulent conduct at the time that it introduced major amendments to the Act in order to significantly strengthen and expand its usefulness as a weapon for fighting fraud against the United States.

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[1] Foulds filed her petition for certiorari in this matter on August 23, 1999 (S.Ct. No. 99-321). Shortly thereafter, the United States filed its own petition (S.Ct. 99-321). Before the Fifth Circuit, the United States and Foulds appeared as co-appellees and advanced the same positions with respect to the Eleventh Amendment issues currently before this Court. Foulds's and the United States's petitions for certiorari likewise seek identical relief. This Court nonetheless has directed Foulds to respond to the United States's petition as well as to Texas Tech's cross-petition. Consistent with the advice of the Clerk of Court, this footnote is provided to confirm for the Court that Foulds supports the United States's petition in Supreme Court Case No. 99-365 for the reasons set for in her own petition.

CROSS-RESPONDENT'S STATEMENT OF THE CASE

1. The False Claims Act, 31 U.S.C. §§ 3729-3733, is the federal Government's "primary litigative tool for combating fraud" committed by all "unscrupulous contractors and grantees." S. Rep. No. 345 (1986), reprinted in, 1986 U.S.C.C.A.N. 5266, 5273. Under the Act, any "person" who, *inter alia*, knowingly presents or causes to be presented a false or fraudulent claim to the United States for payment or approval is liable to the Government for three times the amount of damages which the Government sustains because of that person's act plus penalties for each false claim submitted.

In 1986, Congress substantially amended the False Claims Act and, in particular, its *qui tam* provisions. Section 3730(b) allows any person to bring a False Claims Act suit in the name of the Government to recover damages suffered by the United States and to share in any recovery obtained as a result of the suit. The *qui tam* plaintiff, known as a relator, initiates a suit, by filing a complaint under seal in a United States District Court. Simultaneously, the relator must serve a copy of the complaint on the federal Government together with a written disclosure statement describing all of the information and evidence in the relator's possession relating to the case.. 31 U.S.C. § 3730(b)(2).

The United States then has at least 60 days to investigate the relator's allegations and determine whether to intervene and proceed with the action. *Id.*, § 3730(b)(3). If the United States intervenes, the action is conducted by the Government. *Id.*, § 3730(b)(4)(A). If the Government does not intervene, the relator has the right to proceed with the action in the

Government's name, albeit with significant Government oversight and without the United States ever truly relinquishing control of the litigation. See *Id.*, §§ 3730(c)(2) and (3).

2. Relator Carol Rae Cooper Foulds filed this *qui tam* action under seal on August 4, 1995 in the Northern District of Texas, Lubbock Division. Foulds alleged that defendants Texas Tech University and Texas Tech University Health Sciences Center violated the FCA by submitting false claims to the United States under the federal government's Medicare and Medicaid programs (referred to jointly hereafter as "Medicare"). Specifically, relator alleged that in violation of applicable laws and regulations, defendants submitted claims to Medicare for services performed by physicians when in fact those services were performed by residents or physicians-in-training outside the presence of, and with little if any direct oversight by any physician. Because the Medicare program already separately compensates teaching hospitals for care provided Medicare patients by residents, such billing constitutes double-billing of the Medicare program for resident services. Private institutions, such as the University of Pennsylvania, have been subjected to False Claims Act liability for precisely analogous misconduct.

3. On September 12, 1996, the District Court denied the United States's *ex parte* application for an extension of time to determine whether to intervene and ordered the clerk to unseal Foulds's complaint. Defendants were served on October 18, 1996.

After being served with the complaint, defendants moved to dismiss. They contended, first, that the Eleventh

Amendment precludes the suit, and, second, that the state is not a "person" under the FCA. However, on January 21, 1997, before that motion was decided, the parties filed a joint motion for a stay of the proceedings. This motion was made subsequent to notification to the defendants by the Office of Inspector General of Health Care Finance Administration ("HCFA") that they would be subject to an audit under the Physicians at Teaching Hospitals ("PATH") initiative. At that time, PATH was a nationwide federal effort to investigate allegations against teaching hospitals like those raised in the *qui tam* complaint Foulds had filed. Ultimately, however, Texas was excluded from the PATH initiative, and no audit took place.

Upon being notified that they would not be audited under PATH, defendants moved on August 1, 1997, to have the stay lifted so that their jurisdictional challenge to the *qui tam* action could be decided. Defendants' motion to lift the stay was granted. On September 29, 1997, the District Court further ruled that the designated time for the United States to intervene in the *qui tam* action had lapsed without the United States making an explicit election to do so, and thus that the United States effectively had waived its right to intervene. Defendants' representation at page 2 of its cross-petition that the United States "declined to participate in the suit" is therefore inaccurate.

4. The District Court thereafter turned its attention to defendants' motion to dismiss based on Eleventh Amendment immunity and their contention that states do not qualify as "persons" liable as defendants under the False Claims Act. In an order dated October 3, 1997, the District Court denied

defendants' motion on both grounds. Defendants appealed, and the District Court stayed all proceedings pending the outcome of the appeal.

5. On February 18, 1998, the Fifth Circuit granted the United States's motion to intervene as a matter of right under 28 U.S.C. § 2403 as a plaintiff-appellant in the appeal so that it could defend the constitutionality of the *qui tam* provisions of the False Claims Act as they applied to state defendants.

6. On March 29, 1999, the Fifth Circuit panel reversed the district court's decision with respect to the Eleventh Amendment, holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court." Because the Fifth Circuit determined that the Eleventh Amendment presented a "threshold jurisdictional issue," it decided that it should not reach the statutory question of whether the state is a "person" under the FCA.

7. Foulds filed a petition for a writ of certiorari in this matter seeking review of the Fifth Circuit's Eleventh Amendment decision on August 23, 1999 (S.Ct. No. 99-321). On August 28, 1999, the United States filed its own petition for a writ of certiorari (S.Ct. No. 99-365) which seeks review of the Fifth Circuit's ruling on essentially identical grounds as does Foulds's petition. Texas Tech University and Texas Tech Health Science Center filed briefs in opposition to the petitions for writs of certiorari of Foulds and the United States on September 20, 1999. At the same time, defendants filed their current Conditional Cross-Petition for Writ of Certiorari (S.Ct.

No. 99-513), asking that — if the Supreme Court grants certiorari for purposes of reviewing the Fifth Circuit's ruling with respect to the Eleventh Amendment immunity defense defendants have raised — it also agree to hear the statutory interpretation issue that the Fifth Circuit declined to address.

REASONS FOR DENYING THE CROSS-PETITION

I. TEXAS TECH'S STATUTORY ARGUMENTS ARE NOT RIPE FOR REVIEW.

Because it relates to a claimed right of immunity from suit, Texas Tech's Eleventh Amendment challenge to the jurisdiction of federal courts to hear claims brought against state entities by *qui tam* plaintiffs under the False Claims Act was properly subject to interlocutory review pursuant to this Court's rulings in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The trial court's determination that States are "persons" subject to potential liability under the Act, however, does not raise an issue that normally would give rise to the right to an immediate appeal.[2] In *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995), this Court held that appellate courts lack

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[2] States immediately may appeal orders denying claims of Eleventh Amendment immunity because the right to immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Metcalf & Eddy, Inc.*, 506 U.S. at 144. Texas Tech's statutory claim, however, is a defense to *liability*, not an immunity from suit. It thus may be asserted on appeal from a final judgment without loss of any essential benefit of the defense.

discretion "to append to an * * * appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." 514 U.S. at 47.[3] While *Swint* leaves room to invoke "pendent appellate jurisdiction" to permit appellate review of an otherwise non-appealable ruling that is "inextricably intertwined" with a properly appealable interlocutory order, or that must be decided to ensure "meaningful review" of the issue properly before the court, those circumstances do not exist in this case.

The Eleventh Amendment issue raised in this case is not "inextricably intertwined" with the statutory question decided by the court of appeals. Courts could — and, as the Fifth Circuit properly recognized in its decision below, properly *should* — determine the constitutional issue regarding jurisdiction before considering whether States are "persons" under the False Claims Act. If there is no jurisdiction over the claim, there is no proper case before the courts in which to reach non-jurisdictional issues. Similarly, if no Eleventh Amendment impediment to jurisdiction exists in *qui tam* cases against States, there is no compelling need for appellate courts to expand their jurisdiction to include questions of statutory

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[3] The *Swint* Court reasoned that the statutory scheme of 28 U.S.C. §§ 1292(a)-(b) contemplates that *district courts* have "first line discretion" to determine which orders not enumerated in 28 U.S.C. § 1291 or otherwise appealable under *Cohen* are appropriate for interlocutory review; that the Rules Enabling Act empowers the Court to expand the list of orders appealable on an interlocutory basis only through the rule-making process of 28 U.S.C. § 2072 and not through judicial decision; and that "loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 47, 49-50.

interpretation before final judgment has been entered below. Indeed, this Court has followed precisely such a course of separating Eleventh Amendment jurisdictional questions from statutory interpretation questions in the past. In *Edelman v. Jordan*, 415 U.S. 651 (1974), for example, the Court adjudicated the scope of a State's Eleventh Amendment immunity without addressing whether States are "persons" under 42 U.S.C. § 1983, an issue that the Court only decided fifteen years later. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n.4 (1989). Moreover, the Eleventh Amendment question is not coterminous with the statutory question, nor does it subsume it: The statutory question is substantially broader: Texas Tech's arguments on that question, if accepted, would preclude all False Claims Act suits against state-run entities, including those brought directly by the Attorney General, who clearly is not subject to Eleventh Amendment immunities that justified an interlocutory appeal in this case.

While this Court has adhered in the past to a "*policy* of avoiding the *unnecessary* adjudication of federal constitutional questions," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1981) (emphasis added); see also *United States v. National Treasury Emp. Union*, 513 U.S. 454, 477 (1995), that prudential doctrine presupposes that the Court *has* jurisdiction to review both grounds of decision. Because answering the question whether courts have jurisdiction over a claim is a *necessary* first step in determining whether *any* further issues may be addressed, any policy of addressing statutory questions before non-jurisdictional constitutional matters is irrelevant here.

II. STATES ARE "PERSONS" SUBJECT TO FALSE CLAIMS ACT LIABILITY.

Texas Tech asserts that States are not among the "person[s]" that can be held liable under the False Claims Act for defrauding the United States. Specifically, Texas Tech contends that because "person" is not defined in § 3729(a), and — according to Texas Tech — Congress never intended States to be included among those that could be held liable under the Act, neither *qui tam* plaintiffs nor the United States itself can sue States for False Claims Act violations. Texas Tech is wrong.

"[T]here is no hard and fast rule" that the term "person" should be construed to exclude States when it is used in federal statutes. See *United States v. Cooper Corporation*, 312 U.S. 600, 604-05 (1941). Indeed, the term "person" has frequently been held to include States and their political subdivisions even where Congress did not define the term in a statute. See, e.g., *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934)("It has been held many times that the United States or a state is a 'person' within the meaning of statutory provisions applying only to persons."); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934)("The state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of a tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension."); *California v. United States*, 320 U.S. 577, 585 (1944)(Oakland and California each held to be among "entities other than technical corporation, partnership and associations [that] are included among 'persons'" subject to Shipping Act); *Plumbers' Union v. Door County*, 359 U.S. 354, 359 (1959)("This Court has many times held that government bodies not expressly

included in a federal statute may, nevertheless, be subject to the law.").

"[W]hether the word 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. 108, 112 (1959). If the purpose, subject matter, context, legislative history, or executive interpretation of the statute reveal such an intent, States and other sovereigns should be construed to fall within the meaning of the term. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 83 (1991); *Cooper Corporation*, 312 U.S. at 605.

The "legislative environment" of the False Claims Act leaves no doubt that States are intended to be among the "persons" who can be held liable for defrauding the Federal Government. Every relevant factor leads to that conclusion.

A. The Purpose, Subject Matter and Legislative History of the False Claims Act Demonstrate that Congress Intended the Act to Reach States that Submit False Claims.

The Supreme Court "has repeatedly recognized that the authoritative source of legislative intent lies in the Committee Reports on the bill." *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986). When the False Claims Act was substantially amended in 1986, Congress unequivocally expressed its understanding and intention that the liability provisions of the Act apply to States as well as to any other recipient of federal funds. The Senate Report that accompanied those amendments specifically noted:

> "The False Claims Act reaches *all* parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations ... *as well as States and political subdivisions thereof.*"

S. Rep. No. 99-345, at 8 (emphasis added, internal citations omitted). This statement of the reach of the statute is entirely consistent with the broad remedial purpose of the Act. In addition, the Senate Report "strongly endorse[d]" the opinion offered by the Supreme Court in *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968), that, since its inception, the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." S. Rep. No. 99-345, at 19. Indeed, Congress's primary purpose for overhauling the statute in 1986 was to make it more effective in redressing and deterring fraudulent claims that permeate "all Government programs" ranging from welfare and food stamp benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs, to Medicare and Medicaid programs. Id., at 2-3, 21.

Texas Tech contends that this Court's ruling in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), requires that Congress make its intent "'unmistakably clear in the language of the statute' if it intends to subject a state to liability." Texas Tech Pet. at 13, quoting *Will*, 491 U.S. at 65. In fact, no such broad-based restriction has ever been imposed on Congress. Texas Tech conveniently omits key language from its quotation which demonstrates that *Will*'s discussion of the "clear statement" rule is a mere reference to the uniquely high standard for abrogating the Eleventh Amendment that was established in *Atascadero State Hospital v. Scanlon*, 473 U.S.

234, 242 (1985).[4] Read in their entirety, the relevant passages of *Atascadero* and *Will* plainly limit the requirement that congressional intent be unmistakably clear "in the language of the statute" to circumstances in which Congress intends *"to alter the 'usual constitutional balance* between States and the Federal Government.'" *Will*, 491 U.S. at 65, quoting *Atascadero*, 473 U.S. at 242 (emphasis added). Indeed, this Court has expressly disavowed the notion that *Will* extended the requirement set forth in *Atascadero* to apply where the issue to be determined is one of statutory construction and not one of altering the constitutional balance between States and the Federal Government. See *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 205-206 (1991).

The *qui tam* provisions of the False Claims Act do not "alter the usual constitutional balance between States and the Federal Government." Whether it initiates a suit itself or permits a *qui tam* plaintiff to proceed on its behalf, the United States is *always* the real party in interest in False Claims Act action and, since the inception of the Union, has had the inherent right to sue States for violating federal law. There is thus no basis to limit the means of ascertaining Congress's intent with respect to potential State liability under the Act to "unmistakably clear" language in the text of the Act itself.

Texas Tech also errs in suggesting that Congress was mistaken in its understanding of the reach of the False Claims Act prior to its 1986 amendments. This argument ignores the

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[4] See also, *Atascadero*, 473 U.S. at 253-54 (Brennan, J., dissenting)(majority in *Atascadero* creates, solely with respect to abrogating the Eleventh Amendment, a uniquely high hurdle for Congress to overcome in making its legislative intent manifest).

three Supreme Court cases cited in Senate Report No. 99-345 in support of the conclusion that the False Claims Act applies to States. While the cited cases were not False Claims Act decisions, each holds that, where appropriate to fully implement the remedial purposes of an act, the term "person" is properly construed to include States and their political subdivisions. See *Ohio v. Helvering*, 292 U.S. at 370 (a State is a liable "person" where its activity in selling liquor brings its conduct within area of concern of federal statute); *Georgia v. Evans*, 316 U.S. 159, 161-62 (1942)(state victim is a "person" under terms of the antitrust laws where harm it suffers from an antitrust violation is the same as that suffered by private persons); *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978)(local governments are accountable "persons" under § 1983 where they violate the policies underlying that act). In light of the False Claims Act's broad-based objective of fighting *all* types of fraud against the United States, the cases cited in the Senate Report fully support application of the term to cover any state entity that engages in such misconduct. Indeed, this Court has concluded that States *must* be considered "persons" within the meaning of a statute if "its plain purposes preclude their exclusion." *California v. United States*, 320 U.S. at 585.

Texas Tech also asserts that Senate Report No. 99-345 is irrelevant with respect to the meaning of "person" because it does not describe the 1986 amendments but is rather part of the Report's description of the history of the Act. First, as noted above, in light of the broad remedial purposes that have always formed the foundation of the False Claims Act, Congress's interpretation in 1986 of the prior reach of the Act is entirely sound. More fundamentally, however, Texas Tech is simply wrong in asserting that Congress's understanding of the scope

of the Act at the time it substantially amended the statute is unimportant. In fact, that understanding and how Congress chose to act in light of it are controlling.

In 1986, Congress dramatically reworked the FCA so as to maximize its effectiveness in fighting fraud.[5] As part of its overhaul of the Act, Congress made adjustments to the very provision of the Act at issue here — which persons might be held liable for fraud — by narrowing the exclusion that had previously existed for members of the armed forces and by adding new exclusions (under some circumstances) for Members of Congress, members of the Judiciary, and senior executive branch officials. See Senate Report No. 99-345, at 39, 43; 31 U.S.C. § 3730(e). Although it obviously could, Congress did not provide any similar sort of exclusion for States. That decision is significant.

This Court has noted repeatedly that where, in making major changes to a statute, Congress does not seek to overturn an interpretation it knows the courts have applied to retained provisions of pre-existing legislation, it can be inferred that Congress has ratified the courts' interpretation of that aspect of the law. See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982). A similar inference has been drawn where, in substantially reenacting

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[5] "Beginning in 1985 and ending in 1986, Congress undertook a major overhaul of the False Claims Act, covering both the substantive and the *qui tam* provisions." Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 *Pub. Contract L.J.* No. 2 (Winter 1995), 250 (citations omitted). See also S. Rep. No. 99-345, *passim*.

laws, Congress did not seek to overturn prior administrative interpretations of existing provisions. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). There is no reason to afford any less weight to Congress's decision to leave intact its *own* interpretation of the reach of a statute that it has comprehensively reviewed and has otherwise substantially amended.

When Congress overhauled the False Claims Act in 1986, it specifically addressed the definition of liable "persons" under the Act and reaffirmed the inclusive reach of that term. The intent of Congress in 1986 is manifest and controlling.

B. The Language and Statutory Framework and Executive Interpretation of the False Claims Act Demonstrate that "Person[s]" Include States.

The explicit reference to States and their political subdivisions in the Senate Report coupled with the broadly-stated purpose of the Act to reach *all* fraud against the United States are the clearest indication of congressional intent to hold States liable for any fraud they commit. They are by no means, however, the only aspects of the "legislative environment" of the False Claims Act that support that conclusion. Congress's intent to define "person" to include States is evidenced as well by the text and statutory framework of the Act.

As noted above, although the amended statute specifically provides certain categories of persons partial exclusions from liability, see 31 U.S.C. § 3730(e)(relating to certain *qui tam* actions), it does not include States or their political subdivisions among the excluded groups. Moreover, the narrow limitations Congress placed on the exclusions it

granted military personnel and certain high-ranking federal officials[6] to False Claims Act liability serve only to underscore the breadth of the Act. If Congress was willing, with only limited restrictions, to extend False Claims Act liability to members of the military, Members of Congress, members of the Judiciary, and senior executive branch officials in the Federal Government, there is no reason to presume that it intended to give States and their political subdivisions any greater leeway in defrauding the Federal Government.

Congress's intent to protect the federal fisc from *any* individual or entity that would advance fraud against the federal government is evident as well by its stated intent to include States and their political subdivisions among "employers" that could be held liable under the 1986 amendments for retaliating against their employees for taking lawful action to expose and remedy False Claims Act violations. See 31 U.S.C. § 3730(h). The Senate Report that accompanied the 1986 amendments explained that the definitions of "employee" and "employer" under the new whistleblower protection provisions of the FCA were meant to be *"all-inclusive"* and that the term "employers" was meant to include *"public* as well as private sector entities." S. Rep. No. 99-345, at 34-35 (emphasis added). Cf. *California v. United States*, 320 U.S. at 586 (holding that legislative history stating that the Shipping Act should apply "no less [to]

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[6] The exclusion for members of the armed forces relates only to actions brought against them by other former or present members of the armed forces for claims arising out of service in the armed forces. See 31 U.S.C. § 3730(e)(1). Members of Congress and members of the judiciary are immune only from *qui tam* actions. Id., § 3730(e)(2). And senior executive branch officials are granted an exclusion only with respect to *qui tam* actions that are "based on evidence or information already known to the Government when the action was brought." Id.

public than [to] private owners" of waterfront terminals shows congressional intent to hold cities and States accountable under that act).[7]

The provision of the False Claims Act that was added in 1986 to authorize civil investigative demands ("CIDs") likewise confirms that Congress contemplated that States and their political subdivisions could be held liable for fraud under the statute. In 31 U.S.C. § 3733(l)(4), "person" is defined to include "any State or political subdivision of a State." While Texas Tech has argued that the inclusion of the phrase "[f]or purposes of this section" at the beginning of the definitions set forth in § 3733(l) indicates that Congress intended the definition of "persons" to be different for CIDs than for the liability provisions of the Act, see Texas Tech Pet. at 8-9, the legislative history of § 3733 shows that precisely the opposite is true.

In explaining the CID provisions that were added to the False Claims Act in 1986, Senate Report No. 99-345 notes that the provisions of § 3733 are "nearly identical" to CID authority that had already been granted the Antitrust Division of the

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[7] While this Court held in *Atascadero*, 473 U.S. at 244, that — to effect any necessary abrogation of Eleventh Amendment immunity that might apply to individual's personal suits against States — Congress must clearly specify in the language of the statute itself its intent to affect such abrogation, no such restriction can properly be imposed on where Congress may effectively demonstrate its intent for purposes of deciding the broader question of whether Congress understood and intended to include state entities among those who could be liable to the United States for fraud under the False Claims Act. See, e.g., *Atascadero*, 473 U.S. at 253-54 (Brennan, J., dissenting)(majority in *Atascadero* creates, solely with respect to abrogating the Eleventh Amendment, a uniquely high hurdle for Congress to overcome in making its legislative intent manifest).

Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and that it was intended that "the legislative history and case law interpreting that statute (15 U.S.C. [§§] 1311-14), fully apply to this bill." Id., at 33. Where Congress explicitly intends precedent interpreting one statute to control another, its decision to have the language in the newer bill track that of the older law as closely as possible is only prudent. Moreover, where Congress has announced such an objective, substantive variations from the prior statute that are introduced in the new law must be understood to indicate areas in which Congress intended to deviate from the standards that apply under the older statute. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 581-82 (1978)(noting importance in ascertaining legislative intent of examining where Congress incorporated the text of an older statute verbatim and where it made changes to the language that had been used in the prior legislation).

It is thus noteworthy that one of the ways that the CID provisions of the False Claims Act deviate substantively from their antitrust predecessor is their inclusion of States and States' political subdivisions within the definition of the term "person." Because antitrust CID law does not include state entities within its definition of a "person," Congress's specific decision to add States and their political subdivisions to definition of "person" in § 3733 *conforms* — rather than distinguishes — the use of that term in § 3733 to Congress's understanding of the term "person" in the liability provisions of the Act.[8]

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[8] The intended connection between the CID section of the False Claims Act and pre-existing antitrust legislation also clarifies why Congress included of the phrase "[f]or purposes of this section" as an introduction to the definitions contained in § 3733. The phrase tracks the substantively

An additional weakness of Texas Tech's analysis regarding how to interpret Congress's decision to include a definition of "person" in the CID provisions of the False Claims Act is the fact that the term is used within those provisions to refer both to "person[s]" to whom CIDs might be served and to "person[s] . . . engaged in any violation of a false claims law." See 31 U.S.C. 3733(l)(2). Section 3733(l)(2) defines the term "false claims act investigation" as "any inquiry conducted by any false claims act investigator for purposes of ascertaining whether any *person* is or has been engaged in any violation of a false claims law." (Emphasis added.) Thus, read in its entirety, § 3733 indicates that States and their political subdivisions may be both recipients of CID requests and entities whose knowing submission of false claims to the United States can result in liability under the FCA. Such a reading of § 3733 is consistent with Senate Report No. 99-345 and with the broad remedial purpose of the Act to reach "all types of fraud, without qualification, that might result in financial loss to the Government." Id., at 19; *Neifert-White Co.*, 390 U.S. at 232.

In contrast, to sustain Texas Tech's position, this Court would need to conclude that Congress "got it wrong" twice — first, when it stated in the legislative history of the False Claims Act that it intended to include States among the "persons" whose fraud could be remedied under the Act, and again when it included the term "person" in its definition of a "false claims

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identical passage introducing definitions in the chapter of the Antitrust Act dedicated to CIDs, see 15 U.S.C. § 1311, and thus simply carries forward Congress's stated plan to model the language and meaning of the FCA's new CID provisions wherever possible directly upon the language used in their antitrust predecessor.

law investigation" under § 3733. Where rational alternatives exist, this Court should not adopt a reading of a statute that assumes that Congress was sloppy or ill-informed. In interpreting the law, it is the role of courts "to make sense rather than nonsense out of the *corpus juris*." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991).

Other aspects of the "legislative environment" demonstrate as well that Congress intended to include States in the definition of a "person." In addition to using the term to define who can be held liable under the Act and to whom CID requests might be directed, the False Claims Act also uses the term "person" to define who is eligible to act as a *qui tam* plaintiff in such actions. No one denies States' right to act as *qui tam* relators under the Act. See, e.g., *U.S. ex rel. Woodard and State of Colorado v. County View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986); *U.S. ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). Indeed, when the 1986 Amendments were drafted, Congress expressly acknowledged that fact and acted upon the request of the National Association of Attorneys General to overrule a lower court ruling that the States believed unduly restricted their ability to bring *qui tam* suits under the Act. See S. Rep. No. 99-345, at 12-13. "Identical words used in different parts of the same statute are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 249 (1996). Having successfully urged Congress to strengthen their standing as "persons" for purposes of reaping the rewards of filing *qui tam* actions under the False Claims Act, it is disingenuous for States now to argue that the one and only time they should be excluded from the definition of a "person" in the False Claims Act is when the term is used to refer to those who may be held responsible for having defrauded the Federal Government.

A final factor favoring inclusion of States within the definition of "person" under the Act is the fact — evidenced by its intervention and position on this and other appeals — that the Department of Justice has consistently interpreted the statute in that manner. See *Cooper Corporation*, 312 U.S. at 605 (listing "executive interpretation of the statute" among the relevant considerations). The Department's position reflects sound public policy and a common sense view of congressional intent. Federal grants to state and local governments have risen from a reported $2.4 billion in 1950,[9] to about $108 billion in 1987, to approximately $228 billion in 1996.[10] To exclude States from the reach of the Act would dramatically undermine the ability of the United States to protect the federal fisc.

It also would be wholly illogical to interpret the False Claims Act to exempt state institutions from liability when the Unites States has already successfully prosecuted private institutions for the same fraudulent practices. Yet that will be the result if Texas Tech's interpretation of the False Claims Act prevails. In December 1995, the United States announced the settlement of a False Claims Act suit against the University of Pennsylvania, a private nonprofit corporation, for $30 million. The misconduct charged against the University of Pennsylvania was essentially the same as that Texas Tech is alleged to have committed in this matter. Other teaching hospitals have since paid similar claims. Thus, in Texas Tech's view, Congress

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[9] See D. Cantelme, *Federal Grant Programs to State and Local Governments*, 25 *Pub. Cont. L.J.* 335-336 (1996).

[10] Bureau of the Census, U.S. Dept. of Commerce, Publication FES/96, Table 11, "Federal Expenditures by State for Fiscal Year, 1996" 46 (1997). These amounts do not include federal funds other than grants received by state agencies, such as contracts.

intended to subject private institutions to False Claims Act liability but to exempt state institutions, even though both engaged in the same fraudulent practices. A more sensible and sound reading of the statute is that Congress intended the False Claims Act to ferret out and fight fraud against the United States wherever it occurs.

C. Congress's Clear Intent to Include States as Liable "Person[s]" Under the False Claims Act Should Not Be Overridden.

In light of the overwhelming evidence that Congress intends False Claims Act liability to extend to the wrongdoing of States and state entities, the other arguments Texas Tech offers in support of its position are entitled to no weight. It is irrelevant that, in passing the Program Fraud an Civil Penalties Act ("PFCPA") and the Anti-Kickback Act of 1986,[11] Congress elected to include a definition of "person" that does not include States. See Texas Tech Pet. at 11. Although the PFCPA provides an administrative compliment to the False Claims Act, it was not intended to be co-extensive with it. See Senate Report 99-212, at 4-5, 34 (1985)(PFCPA procedures for adjudicating program fraud claims apply only to "small-dollar" claims; larger dollar claims "should be prosecuted in court" under the FCA). Thus, far from suggesting that courts are free

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[11] The PFCPA permits federal agencies that are victims of false claims to proceed administratively to recover damages where the amount in controversy is less than $150,000 and where the Department of Justice has elected not to pursue the matter in federal court under the provisions of the False Claims Act. See 31 U.S.C. § 380, *et seq*. The Anti-Kickback Act of 1986 makes it unlawful for government contractors to pay, solicit, or charge the Federal Government for kickbacks associated with the bidding or performance of federal government contracts See 41 U.S.C. § 51, *et seq*.

to ignore Congress's stated intent that False Claims Act liability should extend to States, the fact that a narrower definition was added to the text of PFCPA merely confirms the more limited circumstances in which Congress believed reliance on administrative procedures was appropriate. Likewise, the fact that the definition of "person" under the Anti-Kickback Act is narrower than under the False Claims Act provides no basis whatsoever to ignore the clear statement of congressional intent that States may be held liable under the broader provisions of the FCA.[12]

Nor can the reluctance Texas Tech attributes to courts with respect to imposing punitive damages on States justify overriding Congress's intent to include them among the "persons" subject to the False Claims Act. As this Court has previously discussed at length, the multiple damages and civil penalty provisions of the False Claims Act are not "punitive damages" but rather "rough remedial justice." *United States v. Halper*, 490 U.S. 435, 446 (1989), abrogated in other respects, *Hudson v. United States*, 522 U.S. 1165 (1997); see also *United States v. Bornstein*, 423 U.S. 303, 314-15 (1976)(purpose of FCA remedies is to make government completely whole); *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551-53 (1943)(same). There is no basis override Congress's manifest intent to treat state institutions the same as than any other entity that knowingly defrauds the United States.

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[12] Section 1 of the United States Code-Rules of Construction also requires no different result. The definition of "person" included in 1 U.S.C. § 1 is one to be used by default only where the context of a particular statute does not indicate otherwise. The Supreme Court has never applied that section to override a different definition of the term that the "legislative environment" shows Congress intended to apply with respect to a specific statute.

CONCLUSION

For all the reasons set forth above, the Texas Tech's Conditional Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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